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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 259

HOLIDAY LODGE, INC.,

Petitioner,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINION.

The Opinion of the Circuit Court of Appeals for the Seventh Circuit is reported at 300 F. 2d 516 and is set forth in the Appendix to the Petition.

JURISDICTION.

The jurisdictional requisites are not adequately set forth in the Petition. None of the sections of the United States Code cited in the petition furnishes a basis of jurisdiction. It may be that Petitioner's reference to Section 1251(1) of Title 28 of the United States Code is an error and that Petitioner meant to invoke the jurisdiction of the Court under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Does the Court, in a proceeding under Chapter XI of the Bankruptcy Act, 11 U. S. C. Sec. 301-339, have the power to restrain a mortgagee from foreclosing a mortgage on real estate which is the subject of a lease to the Debtor, which lease is subordinate to the mortgage?

2. Is the refusal to vacate an order restraining foreclosure of such a mortgage an abuse of discretion when such refusal is made six months after entry of the restraining order, during which period the Debtor has paid no rent, the business has not earned sufficient to pay current rents, and the mortgagee has been paid nothing on its mortgage?

STATUTES INVOLVED.

The pertinent provision of the Bankruptcy Act—i.e., Sec. 314, 11 U. S. C. Sec. 714—is set forth at Pages 3-4 of the Petition.

STATEMENT OF THE CASE.

Petitioner's statement of the case, to the extent that it quotes the Opinion of the Court below at Pages 4-6 of the Petition, is satisfactory.

The so-called "controlling fact," the "omission" and the "patent error," referred to at Pages 6-7 of the Petition, are not accepted by the Respondent.

ARGUMENT.

I.

THE DECISION IS CLEARLY CORRECT.

The issue in the present case is a narrow one and the Petitioner by argument cannot convert it into one warranting review by this Honorable Court on Certiorari. Certiorari jurisdiction was not conferred upon the Court merely to give the defeated party another hearing. *Magnum Import Co. v. De Spoturno Coty*, 262 U. S. 159, 163. The Court below correctly found that the lien of the Respondent's mortgage was not on the property of the Petitioner and that, to the extent of that lien, the Petitioner has no interest in the real estate. This was a correct conclusion and the Petitioner, in his Petition for Certiorari, does not say otherwise—does not contend that Respondent's lien is on the property of the Petitioner. Thus, the Court below correctly concluded that "* * * literally, according to the language of Sec. 714, * * * the court did not have jurisdiction under this section to grant or continue the restraining order."

The Court below, of course, did not rest its decision on the sole ground of the literal language of Section 714 but also concluded that under all the circumstances the District Court abused its discretion in continuing the restraining order in effect. While the restraining order had been in effect for six months, Respondent's mortgagor was paying nothing on the mortgage indebtedness (App. 90) and the Petitioner was occupying the mortgaged premises rent-free; and, further, the Petitioner had conceded that any Plan of Arrangement it might propose would require

the continued restraint of the Respondent. Thus, the only asset of the Petitioner hung by the thread of the stay order, and the reasoning of *Chaffee County Fluorspar Corp.* v. *Athan*, 169 F. 2d 448, 450, was applicable.

On the facts presented by this Record, the decision of the Court of Appeals was manifestly correct.

II.

THERE IS NO CONFLICT OF DECISION.

Petitioner asserts that the decision in the instant case is in conflict with the decision of the Second Circuit Court of Appeals in the case of *Lockhart* v. *Garden City Bank*, 116 F. 2d 658. Such is not the case. The *Lockhart* case involved a chattel mortgage on the automobile and trucks of the Debtor. In the instant case, the real estate mortgage held by the Respondent is not on the property of the Debtor—it is on the real estate of the Debtor's lessor. The Petitioner (Debtor) is a mere tenant. The issue in the *Lockhart* case was whether or not the chattel mortgage given by the Debtor was void as against a Trustee in Bankruptcy. In the *Lockhart* case, there was no restraining order and the comments of the Court there, to which the Petitioner refers at Page 9 of its Petition, are not only dictum but clearly show that the Court there was discussing the effect of Section 714 as it related to mortgaged property of the Debtor. The Court was not discussing the question of jurisdiction by virtue of Section 714 over property which is the mortgaged property of the Debtor's lessor, as is the property in the instant case.

III.

THE DECISION OF THE COURT BELOW DOES NOT CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner asserts that the Court below disregarded the rights of the Debtor. No one can disagree with the proposition that the rights of the Debtor are to be safeguarded in a Bankruptcy proceeding, but Petitioner has cited no case which suggests that in a Chapter XI proceeding one who is not a creditor of the Debtor may be indefinitely restrained from proceeding against such creditor's real estate security, which real estate is not property of the Debtor. Moreover, the effect of the restraining order was to permit the Petitioner to remain in possession of the mortgaged premises rent-free notwithstanding the obligation of the Debtor to pay the mortgage requirements and real estate taxes as part of the rent under Debtor's lease.

The remarks of the Court, quoted by Petitioner at Page 11 of its Brief, from *Marine Harbor Properties, Inc. v. Mfrs. Trust Co.*, 317 U. S. 78, 86, were obviously not concerned with a Chapter XI proceeding but with a Chapter X proceeding. The considerations to which the Court referred would be relevant if the instant case were a Chapter X proceeding and if the mortgage held by the Respondent were on the property of the Debtor. The contrary, of course, is true and Petitioner has referred to no authority approving the proposition that in a Chapter XI proceeding one who is not a creditor of the Debtor may be restrained indefinitely and as a part of the Plan of Arrangement from attempting to foreclose on its lien, which lien is not on the property of the Debtor. It is, of course, possible that creditors of Petitioner may suffer a loss, but that possibility should not deny Respondent, who is not a creditor of the Petitioner but is a secured

creditor of the Petitioner's lessor, from enforcing rights which its mortgage gives it and which its Board of Directors (App. 86) determined was the proper action to be taken by Respondent and which is consistent with its responsibility to its investors. What Respondent was concerned with, and brought to the attention of the Court below, was that there had been and would be further irreparable injury to it. Obviously, if a tenant of mortgaged premises can effectively restrain a mortgagee from proceeding against its mortgagor when the mortgage is in default, and the default in monthly payments continues month after month, the danger of irreparable injury is to the mortgagee—that is, this Respondent—and, if continued, the restraint permits the junior interests to speculate with the first mortgagee's security. This is particularly so when such tenant—the Debtor here—is attempting to make effective a Plan of Arrangement which calls, as the Court below found, for the continued restraint of such mortgagee —i.e., the Respondent.

There is no departure from fundamental law for there is no law—fundamental or otherwise—that permits a secured creditor of a Debtor's landlord to be restrained from proceeding against the landlord while the tenant attempts to effect a Plan of Arrangement—and particularly is there no such law which says that a failure to vacate such a restraining order after it has been in effect for six months may not be properly held to be an abuse of discretion.

The decisions to which Petitioner refers, under III at Page 12 of its Brief, are not applicable to the facts in the instant case for the reason, among others, that they do not relate to a Chapter XI proceeding. Obviously, Section 314 of the Bankruptcy Act—the Section which the Court construed in the instant case—was not involved in any of the cases the Petitioner there cites. Further, in *Continental Illinois Bank* v. *Rock Island R. R.*, 294 U. S. 648, cited at

Page 12 of the Petition, it was said that the injunctive power could be used only for a "reasonable time." Thus, under any analysis, there was still room for the Court below to decide that under all of the circumstances the injunctive power had been exercised for an unreasonable time.

Any delay of the case at bar is not attributable to Respondent. The Petitioner has been free since February 1961, and it is still free, to attempt to effect a Plan of Arrangement. But Petitioner's hopes for a Plan of Arrangement depended, and still depend on the Respondent being restrained *ad infinitum* from foreclosing on its mortgage.

Petitioner has seen fit to introduce, at the bottom of Page 14 of its Petition, a reference *dehors* the record that the Federal Court Receiver had, as of July 1, 1962, $45,000.00 in net earnings. This statement was injected in violation of the basic rule of appellate procedure which requires that the Court look only to the certified record in deciding questions presented. *Lawn v. United States*, 355 U. S. 339, 354. However, assuming that on July 1, 1962 the Federal Court Receiver did have $45,000.00, it is, nevertheless, true that this amount was realized during the period since January 30, 1961 when neither the Debtor nor the Receiver paid any rent for use and occupancy of the mortgaged premises or anything on account of the mortgage indebtedness (App. 89, 90), despite the fact that the lease between Petitioner and its lessor called for rent of $10,300.00 per month (App. 90). Thus, even if the Bankruptcy Receiver did have on hand, as of July 1, 1962, the sum of $45,000.00, such fact only serves to demonstrate that the cozy little operation of the Debtor's business was short well over $100,000.00, plus fees to the Receiver and his counsel and other costs of administration, to say nothing of failing to produce any sums to apply to the reduction of the mortgage delinquency which dates back to

June 1960 (App. 86). And the Petitioner having improperly opened the door to matters not in the Record compels us to point out that the mortgage indebtedness grew from $759,741.91, when the Bankruptcy proceeding began on January 30, 1961 (App. 87), to $856,224.76 on July 1, 1962. The mortgage held by Respondent has been delinquent since June 30, 1960 (App. 86). For more than twenty-five consecutive months not one dollar has been paid to Respondent on account of principal or interest owing on its mortgage.

The Court below has done what *Alabama* v. *United States*, 279 U. S. 229, cited by Plaintiff at Page 16 of its Petition, says is the duty of the Court upon an appeal from an order granting or denying an interlocutory injunction. The Court below has simply determined that in all events the discretion of the District Court was abused when it refused to vacate the six-month-old restraining order. And the Court of Appeals adhered to this view on rehearing *en banc* requested by Petitioner.

The argument of Petitioner, at Page 18, that the instant decision concerns itself only with the rights of the mortgagee is a gratuitous reflection upon the Court below. The rights of the Debtor-Petitioner have not been disregarded. The Debtor still has its lease and whatever rights that lease gives it. The Chandler Act has not been nullified. The Petitioner can still attempt to effect a Plan of Arrangement. The Court, however, did recognize that any Plan that the Debtor might propose was wholly speculative and required the continued restraint of Respondent. Petitioner does not here admit that any Plan it might propose would require the continued restraint of the Respondent but, in oral argument before the Court below, counsel for the Petitioner admitted that such was the case. In its Petition for rehearing, the Petitioner stated, at Page 18: "We have *never* asked, even *indirectly*, for a *judicial moratorium* on

any *future* payments . . . " and added " . . . and an orderly plan for prompt liquidation of past indebtedness is also provided for." It thus seems clear that Petitioner admits that its Plan asks for a judicial moratorium on the *delinquent* payments on Respondent's mortgage. The Petitioner has cited no authority which would permit approval of a Plan of Arrangement that calls for such a restraint or that would permit the Court to so restrain a secured creditor of the Petitioner's landlord.

The Court below did not, as Petitioner contends at Page 19 of its Petition, reverse the District Court on the ground that it abused its discretion in not requiring the Petitioner to file a definite Plan. The Court merely noted that one of the circumstances of the case was that no Plan, or any proposed Plan, had been submitted and further noted that "under the shelter of the restraining order counsel for the Debtor has continued to express hopes, wholly speculative, which significantly depend upon the continued restraint of the Association from foreclosing on its first mortgage, which has legal priority to Debtor's lease."

CONCLUSION.

It would appear that the Court of Appeals did what was right, proper and legal under the Record. For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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